Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term, ___

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,

*Appellants,*

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,

*Appellees.*

*On Appeal From The Supreme Court of New Mexico*

## *JURISDICTIONAL STATEMENT*

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*Appellees.*[1]

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On Appeal From The Supreme Court Of New Mexico

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## JURISDICTIONAL STATEMENT

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[1] Appellees in the New Mexico Supreme Court, in addition to the State of New Mexico, were the Bureau of Revenue and its Commissioner, Mr. Fred O'Cheskey. By New Mexico Laws 1977, Chapter 249 (effective March 31, 1978), the Bureau of Revenue was abolished and the Electrical Energy Tax Act was amended to define "Bureau" as the Revenue Division of the Taxation and Revenue Department. The Revenue Division and its Director, Mr. Arthur B. Snead, have succeeded to the functions of the Bureau of Revenue and Mr. O'Cheskey, respectively, and have been substituted as parties here, pursuant to Rule 48(3), Rules of the Supreme Court.

Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tucson Gas & Electric Company hereby appeal from the opinion and judgment of the Supreme Court of the State of New Mexico, entered on March 23, 1978, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

## OPINIONS BELOW

The Memorandum Opinion of the District Court of the First Judicial District, Santa Fe County, New Mexico, is not reported and appears herein as Appendix A. The Opinion of the Supreme Court of New Mexico is reported at ___ N.M. ___, 576 P.2d 291, and appears herein as Appendix B. No other written opinions have been delivered.

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is an action commenced by appellants in the District Court of the First Judicial District, Santa Fe County, New Mexico, seeking a judgment declaring the provisions of New Mexico's Electrical Energy Tax Act, Chapter 263, Laws 1975 (Appendix D) to be unconstitutional and void by reason of the provisions of Article I, Section 8, cl. 3, Article I, Section 10, Article IV, Section 2, cl. 1, and Amendment XIV of the Constitution of the United States, and by reason of the



provisions of Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391. The decision of the Supreme Court of New Mexico (Appendix B) was in favor of the validity of the Electrical Energy Tax Act.

(ii) The judgment or decree sought to be reviewed is the Opinion of the Supreme Court of New Mexico (Appendix B) sustaining the Electrical Energy Tax Act. That Opinion was issued and filed on March 23, 1978. No petition for rehearing was submitted. The Notice of Appeal (Appendix C) was filed in the Supreme Court of New Mexico on April 12, 1978.

(iii) Jurisdiction of the appeal is conferred by Title 28, United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

*American Oil Co. v. Neill*, 380 U.S. 451 (1965)

*Austin v. New Hampshire*, 420 U.S. 656 (1975)

*Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977)

*Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963)

*Heublein, Inc. v. So. Carolina Tax Comm'n*, 409 U.S. 275 (1972)

*Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954)

(v) The validity of the New Mexico Electrical Energy Tax Act, Chapter 263, Laws 1975 is here involved. The pertinent provisions of that Act have been codified at Sections 72-34-1 through 72-34-6, NMSA 1953 (1975 P.S.) and Section 72-16A-16.1, NMSA 1953 (1975 P.S.). The full text of that Act is set forth in

Appendix D. The full text of Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391 is as follows:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

## QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Is the New Mexico Electrical Energy Tax Act, which applies only to electricity generated in New Mexico and transmitted to other states for sale and consumption, discriminatory within the meaning of §2121(a) of the Tax Reform Act of 1976, and consequently null and void by reason of the Supremacy Clause?

2. May a state, consistently with the limitations imposed by the Commerce Clause, impose a tax which applies only to electricity generated within that state and transmitted to other states for sale and consumption?

3. Does a state tax, the clear purpose and effect of which is to collect revenue solely from citizens of other states, violate the Commerce Clause and the Due Process Clause of the Fourteenth Amendment?

4. Is it a violation of the Import-Export Clause for a state to impose a tax whose economic incidence is on electricity transmitted for sale and consumption in a foreign nation?



## STATEMENT OF THE CASE

Appellants Arizona Public Service Company (hereinafter "APS"), El Paso Electric Company (hereinafter "EPE"), Salt River Project Agricultural Improvement and Power District (hereinafter "SRP"), Southern California Edison Company (hereinafter "SCE"), and Tucson Gas & Electric Company (hereinafter "TGE") are public utility companies whose service areas encompass the major population centers of El Paso, Texas; Tucson and Phoenix, Arizona; and Southern California (excluding the City of Los Angeles); and their environs. EPE also provides retail electric service in an area in south central New Mexico, and is the only appellant regulated as a public utility by the State of New Mexico.

Portions of the electricity required to satisfy the demand for energy in these areas, which include an aggregate population in excess of 10 million people, is produced by appellants at generation facilities located within the boundaries of the State of New Mexico. Electricity generated at these New Mexico facilities is first delivered, through a switchyard, to transformers which increase its voltage to a level required for transmission. This high voltage energy is then allocated by switchyard facilities to transmission lines which carry it to the particular service area where it is destined to be consumed. Until generated energy is transformed and allocated in this fashion, the particular market in which it will be distributed cannot be identified. The transmission systems of appellants are interconnected

with each other and with the systems of other electric utilities and the United States Bureau of Reclamation, thereby forming an interstate grid encompassing the entire western United States and portions of Canada and Mexico.

Certain amounts of the energy generated by appellants at their New Mexico facilities is initially sold, at the wholesale level, to other utilities for subsequent resale. Appellants have engaged in such wholesale transactions both with each other and with other utilities, including Public Service Company of New Mexico. The balance of this energy generated in New Mexico by appellants is sold at the retail level, for immediate consumption. The vast majority of these sales are made after the electricity has been transmitted, for consumption in the appellants' service areas in other states.[2]

The New Mexico Electrical Energy Tax Act (hereinafter "the Energy Tax" or "the Act") became effective on July 1, 1975. (The full text of the Act is set forth in Appendix D). Section 3(A) of the Act, §72-34-3.A, NMSA 1953 (1975 P.S.), purports to impose upon "the privilege of generating electricity in this state for the purpose of sale," a tax of four-tenths of one mill for each net kilowatt hour of electricity generated in New Mexico. The levy's apparent effect is blunted, however, by the "credit" provisions contained in Section 9, §72-16A-16.1, NMSA 1953 (1975 P.S.). Thus, Section 9(B) permits the generator to take a

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[2] APS has made some minor retail sales of electricity in New Mexico, and EPE engages in retail sales of power in that portion of its service area which is located in southern New Mexico.



credit, against the New Mexico Gross Receipts Tax, §72-16A-1, *et seq.*, NMSA, in the amount of any Electrical Energy Tax paid with respect to electricity *generated and consumed in New Mexico.*[3] No similar credit is available for electricity generated in New Mexico but consumed in other states.

Much of the electricity generated in New Mexico, both by plaintiffs and others, is initially sold in a wholesale transaction for resale at the retail level. The New Mexico Gross Receipts Tax does not apply to such wholesale transactions. Under ordinary circumstances, accordingly, a generator-wholesaler would not be in a position to invoke the credit provisions of Section 9(B), for that generator would incur no gross receipts tax liability against which to credit the amount of Energy Tax imposed. Section 9(C) provides a pointedly limited accommodation for this situation. Under Section 9(C), the wholesale seller is required to assign, to the person marketing the electricity *for consumption in New Mexico,* any applicable credit available under Sections 9(A) and (B). The retailer-assignee is in turn required to reimburse the wholesaler-assignee in an amount equal to the credit against the Gross Receipts Tax received by the retailer. This credit assignment-reimbursement device insures that the generator-wholesaler, who would not ordinarily be subject to the Gross Receipts Tax and would ordinarily receive no benefit from the Section 9(B) credit, will incur no greater tax liability for locally consumed en-

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[3] This Court has previously described the operation of these credit provisions. *See Arizona v. New Mexico,* 425 U.S. 794, 795 (1976).

ergy. Again, Section 9(C) is wholly inapplicable if the wholesaled energy is resold for consumption in another state.

Throughout the course of this litigation, it has been undisputed that, because of the credit provisions of Sections 9(B) and (C), the Energy Tax will impose no additional tax liability upon electricity which is generated and consumed in New Mexico. To the contrary, to the extent the Energy Tax produces any additional revenue for the State of New Mexico, such revenues will derive entirely from electricity which is generated in New Mexico, and transmitted to and consumed in other states.[4]

Shortly after the enactment of the Act, the State of Arizona sought to invoke this Court's original jurisdiction in order to challenge the constitutional validity of the Energy Tax. This Court noted the pendency of this litigation in the courts of New Mexico, and declined to exercise original jurisdiction, observing:

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[4] Subsequent to the filing of the action, each appellant submitted to the Bureau of Revenue a return which showed the following amounts of electricity generated by each in New Mexico in July, 1975, and the amount of Energy Tax applicable to that generation which would not be expunged by the Act's credit provisions:

| Appellant | Amount of Generation (KWH) | Amount of Tax |
|---|---|---|
| APS | 417,874,000 | $167,149.60 |
| EPE | 94,720,752 | 37,806.70 |
| SRP | 48,145,000 | 19,258.00 |
| SCE | 231,003,000 | 92,401.20 |
| TGE | 145,206,000 | 58,082.40 |



> If on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. §1257(2). *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976).

This action was commenced in the District Court of Santa Fe County on September 18, 1975, with the filing of a Complaint seeking a declaratory judgment that the Act was void and unconstitutional by reason of the provisions of Article I, Section 8, cl. 3, Article I, Section 10, Article IV, Section 2, cl. 1 of the Constitution of the United States, and of the due process and equal protection clauses of Amendment XIV to that Constitution. An initial Motion for Summary Judgment was filed by appellants on September 15, 1976.

Subsequent to the passage of the Tax Reform Act of 1976, appellants filed an Amended Complaint, alleging the Act to be void and unconstitutional by reason of the provisions of Article VI, cl. 2 of the Constitution. A Supplemental Motion for Summary Judgment was thereafter submitted. Appellees responded with a similar Motion for Summary Judgment and the matter was heard by the District Court in due course. Following the issuance of its Memorandum Opinion (Exhibit A), the District Court entered Judgment, on February 18, 1977, denying appellants' Motion for Summary Judgment and Supplemental Motion for Summary Judgment, and granting appellees' Motion for Summary Judgment.

An appeal was duly taken to the Supreme Court of New Mexico. On March 23, 1978, the New Mexico Supreme Court issued its Opinion (Appendix B), affirming the judgment of the District Court and sustaining the validity of the Energy Tax. A Notice of Appeal to this Court was filed with the New Mexico Supreme Court on April 12, 1978. (Appendix C).

## THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents the question whether the State of New Mexico may constitutionally impose a form of "domestic export tax" which applies *only* to goods (here, electricity) produced within the State which are transported to other states for sale and consumption. Perhaps more significantly, the New Mexico Supreme Court has sustained the Energy Tax, and New Mexico's authority to enact it, in the face of an explicit Congressional prohibition against its imposition. Plenary consideration by this Court is required both to prevent frustration of the expressed will of Congress and to repudiate a principle which undermines the acknowledged purpose of the Commerce Clause:

1. This Court has consistently recognized that Article I, Section 8, cl. 3 of the Constitution (the "Commerce Clause") vests Congress with virtually plenary regulatory authority in matters affecting interstate commerce, *cf., e.g., Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964), including the power to define the permissible and the impermissible in state taxation of interstate businesses. *Cf.*, 15 U.S.C. §381; *Heublein, Inc. v. So. Carolina Tax Comm'n*, 409 U.S. 275 (1972). Once Congress has spoken, the Supremacy



Clause (Article IV, cl. 2 of the Constitution) requires the invalidation of any conflicting state enactment. *Cf., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945).

Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391, forbids the imposition by a state of any tax "on or with respect to the generation of electricity" which is "discriminatory". A "discriminatory" tax is defined by and for the purposes of that statute as one which "results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce" than on locally-consumed energy. The Energy Tax falls quite clearly within the scope of that definition.

It cannot be disputed that the Energy Tax is one "on or with respect to the generation of electricity. . . ." The discriminatory burden of the Energy Tax is equally apparent. As this Court observed in *Arizona v. New Mexico, supra:*

> The tax is nondiscriminatory on its face: it taxes all generation regardless of what is done with the electricity after generation. However, the 1975 Act provides a credit against gross receipts tax liability in the amount of the electrical energy tax paid for electricity consumed in New Mexico .... The State of New Mexico concedes that the Arizona utilities will not be able to take advantage of the credit because their sales of electrical energy are outside the State .... 425 U.S. at 794-95.

Under the "credit" provisions of Section 9 of the Act, the tax imposed by Section 3 will *never* be paid with respect to energy consumed in New Mexico.[5] Section 9(B) wholly expunges any electrical energy tax which would be imposed upon electricity consumed in New Mexico, by allowing it to be credited against New Mexico's Gross Receipts Tax (§§72-16A-1 *et seq.*). This credit arises *only* when the electricity is sold at retail for consumption in New Mexico. No similar credit is provided for electricity generated in New Mexico but consumed in other markets. Section 9(C) of the Act insures that the discrimination is complete. A wholesaler of electricity generated in New Mexico incurs no gross receipts tax liability against which the amount of Energy Tax due could be applied. The assigned credit and reimbursement device created by Section 9(C) will directly abate any electrical energy tax imposed on energy sold at wholesale for local consumption, leaving the burden of the tax to fall entirely upon utilities such as appellants who sell at wholesale for consumption outside New Mexico.

The net effect of this statutory scheme is obvious. Electricity generated and ultimately consumed in New Mexico is not subject to the economic burdens of the Energy Tax, while electricity transmitted for consumption in other states is taxed. The Energy Tax clearly and undeniably imposes a "greater tax burden on electricity ... generated and transmitted in interstate

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[5] Regulations issued by the New Mexico Commissioner of Revenue expressly recognize that the tax is immediately offset by a "potential" credit. The text of G. R. Regulations 16.1:1 is set forth in Appendix E.



commerce" within the meaning of the Tax Reform Act.

The language of the Tax Reform Act is clear and unambiguous. Section 2121(a) speaks of *"a tax* on or with respect to the generation or transmission of electricity," not *all taxes* or the *total tax structure.* Congress enacted a statute which, by its terms, invalidates any single state tax which is in fact discriminatory. There is no exculpation based upon other aspects of the state's tax structure. Nor is there any basis, either in the language of the Tax Reform Act or its legislative history, for the New Mexico Supreme Court's implicit assumption that Congress was merely engaged in the essentially unnecessary exercise of reconfirming doctrine enunciated by this Court in prior decisions. Indeed, the legislative history makes quite clear the intent of Congress to specifically reach and proscribe the Energy Tax.

The provision that was to become §2121 was added by the Senate Finance Committee to the version of the Tax Reform Act passed by the House of Representatives (H.R. 10612). In its explanation of this addition, the Report of the Finance Committee clearly describes the Energy Tax as an example of the type of state taxation to be forbidden:

*Reasons for change*

> The committee has learned that one State places a discriminatory tax upon the production of electricity within its boundaries for consumption outside its boundaries. While the rate of the tax itself is identical for electricity that is ultimately consumed outside the State and electricity which is consumed inside the State, discrimination re-

sults because the State allows the amount of the tax to be credited against its gross receipts tax if the electricity is consumed within its boundaries. This credit normally benefits only domiciliaries of the taxing State since no credit is allowed for electricity produced within the State and consumed outside the State. As a result, the cost of the electricity to nondomiciliaries is normally increased by the cost the producer of the electricity must bear in paying the tax. However, the cost to domiciliaries of the taxing State does not include the amount of the tax.

The committee believes that this is an example of discriminatory State taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce. S. Rep. No. 94-938-Part I, 94 Cong., 2d Sess. (1976) 437-38 (footnotes omitted), as reported in 1976 U.S. Code Cong. & Admin. News, 3865-66.

Almost immediately following the report of the Finance Committee bill to the Senate, Senator Domenici of New Mexico proposed an amendment to strike this new section in its entirety. During the course of floor debate on this "Domenici Amendment", it was made quite clear that the section, if retained, would invalidate the Energy Tax. *See*, 122 Cong. Rec. S. 12712 *et seq.* (daily ed. July 28, 1976). The proposed "Domenici Amendment" was soundly defeated, and the Senate enacted the provision without change.

The Conference Committee which considered and resolved the differences between the Senate and House versions of H.R. 10612 incorporated the section on discriminatory taxation, but changed the words "higher gross or net tax" to "greater tax burden" without further explanation. The Conference Report expressly



states that it is adopting the Senate amendment to H.R. 10612. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. (1976) 503, as reported in 1976 U.S. Code Cong. & Admin. News 4206; S. Conf. Rep. No. 94-1236, 94th Cong., 2d Sess. (1976) 503. The Conference version was passed by both the House and Senate without further alteration, and signed into law on October 4, 1976.

The construction accorded §2121(a) by the New Mexico Supreme Court disregards this legislative history and renders it essentially meaningless. That Court's contrived reading of the statute leads to the anomalous and improper result of rendering a Congressional statute inapplicable to the very situation which precipitated its passage. This Court has consistently held that such a result is to be avoided:

> Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

The clear and unambiguous wording of 15 U.S.C. §391 encompasses the New Mexico Electrical Energy Tax Act and prohibits its assessment. The statutes's legislative history makes it abundantly clear that it was intended to achieve that result. The New Mexico Supreme Court has effectively re-worded a Congressional enactment in a fashion that disregards Congressional intent, in order to save the Energy Tax. This is a particularly compelling setting for the exercise of this Court's jurisdiction.

2. Although it is literally a grant of legislative power to the United States Congress, it is now established that the Commerce Clause, (Article I, Section 8, cl. 3 of the Constitution) of its own force, acts as a restriction upon the taxing powers of the states, even where Congress has not spoken. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977). Perhaps the principal limitation imposed by the provisions of the Commerce Clause, as interpreted by this Court, is that a state may neither regulate nor tax in a fashion that discriminates against interstate commerce. *Cf., Boston Stock Exchange v. State Tax Comm'n, supra*; *Northwestern States Portland Cement Co. V. Minnesota*, 358 U.S. 450, 458 (1959); *Best & Co. v. Maxwell*, 311 U.S. 454, 457 (1940). "The conclusion is inescapable: *equal treatment for in-state and out-of-state taxpayers similarly situated* is the condition precedent" for a valid state tax on interstate transactions. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69-70 (1962) (emphasis added).

The discriminatory nature of the Energy Tax is no more apparent than when one views its impact upon wholesale transactions. Prior to enactment of the Energy Tax, wholesale transactions of both interstate and local utilities were treated in equivalent fashion under the New Mexico Gross Receipts Tax—neither transaction was subject to its provisions. Under the Energy Tax, if a utility generating electricity in New Mexico sells that electricity at the wholesale level to an entity that transmits it to another state for consumption, no credit arises and the Energy Tax must be paid. If, on the other hand, that electricity is wholesaled to a distributor or retailer who markets it for consumption in



New Mexico, no Energy Tax will be paid, by operation of the provisions of Sections 9(B) and (C). The effect of Section 9(C) is to substitute a private rebate for a tax credit which entirely relieves a company generating and wholesaling power for consumption in New Mexico from any additional tax liability.[6]

There are other more subtle forms of discrimination involved as well. Because they transmit a greater portion of the electricity they generate in New Mexico for consumption in other markets than do local utilities, appellants will incur a far greater tax liability under the Energy Tax and will be placed at a competitive disadvantage in the wholesale market where they do compete with New Mexico-based utilities. A similar consequence can be anticipated at the retail level for EPE, which competes directly with local New Mexico utilities in uncertified areas in southern New Mexico. It is clearly impermissible for a state to levy a tax which discriminates against interstate commerce "by providing a direct commercial advantage to local busi-

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[6] The statutory terminology is somewhat fictionalized. If the tax statutes of New Mexico are straightforwardly applied, the wholesaler of electricity incurs no Gross Receipts Tax liability, and has nothing against which to apply its Section 9(B) credit. Strictly speaking, then, the wholesaler has no "credit" to assign to its retailer customer under Section 9(C). To deal with this problem, regulations issued by the Bureau of Revenue refer to the wholesaler as acquiring a "potential credit" which is assigned and becomes an actual credit if the energy is in fact resold to New Mexico consumers (Appendix E). Quite obviously, the Act itself refers to no such "potential credit" concept.

ness . . . ." *Northwestern States Portland Cement Co. v. Minnesota, supra*, 358 U.S. at 458.

The discrimination of the Energy Tax against wholesale sales of power for eventual consumption in other states, however, is explicit. In *Halliburton Oil Well Cementing Co. v. Reily, supra*, this Court considered the application of a Louisiana use tax to specialized oil well servicing equipment which was manufactured and assembled by the taxpayers in other States for use in Louisiana. In valuing this equipment for use tax purposes, Louisiana employed a method of computation that placed the taxpayers on the same footing as local companies who purchased the equipment at retail in Louisiana, but not with local entities who had purchased and assembled the equipment themselves. The Court enunicated the rule of "equal treatment for in-state and out-of-state taxpayers", 373 U.S. at 70, and held that Louisiana had used an invalid basis for comparison in applying it. As Halliburton was a "manufacturer-user", it had to be treated as would a local "manufacturer-user" rather than a local purchaser. In the present case, the appellants, interstate wholesalers, must be compared with local wholesalers and, when they are, the equality of treatment mandated by *Halliburton* is indisputably absent.

The Opinion of the New Mexico Supreme Court simply ignores the undeniably discriminatory impact of the Energy Tax on wholesale transactions. That Court's observation that: "All producers *who retail their electricity* in New Mexico can take advantage of the credits provided in §9", 576 P.2d at 295 (emphasis added), both makes and misses the point. The point



missed is that the most invidious and direct discrimination of the Energy Tax occurs at the *wholesale* level. The point made is that the benefits of the credit provisions, which wholly expunge Energy Tax liability, are extended *only* to those whose transactions are localized within the State, leaving the entire burden of the Act to fall upon those engaged in interstate commerce.

The pretense that New Mexico has simply reduced its gross receipts tax on the retail sale of electricity to 2%, while taxing all generation at 2%, is just that. The Energy Tax cannot be saved by rewriting it as a hypothetical alternative tax which may or may not survive constitutional scrutiny. The tax which New Mexico actually seeks to impose falls only upon interstate transactions, and that type of discrimination merits plenary consideration and disavowal by this Court.

3. A separate source of constitutional concern where State taxation is applied to transactions in interstate commerce is "the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce." *Gen'l. Motors Corp. v. Washington*, 377 U.S. 436, 440 (1964). *Cf. also, Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Where that danger becomes a reality, as here, the tax on the interstate transaction is unconstitutional.

The Energy Tax indisputably places an economic burden upon electricity generated within the State of New Mexico, and that burden will be borne by that electricity until it reaches its point of initial consumption. Because of the credit provisions of the Act, its economic burden falls solely upon electricity transmit-

ted for consumption in other states. In the District Court, appellants demonstrated that the same electricity which bears the exclusive burden of the Energy Tax becomes subject to additional taxation when it reaches the state where it is to be consumed. In 1975 alone, appellants paid over $13,000,000 in taxes, attributable to electricity generated in New Mexico, to state and local jurisdicitons where that electricity was consumed.

The New Mexico Supreme Court again avoids this issue of multiple taxation by characterizing the Energy Tax as one on the generation of electricity, which, it reasons, only occurs in New Mexico and can only be taxed by New Mexico. 576 P.2d at 296. The Court's principal reliance for this conclusion is on *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), in which this Court held that generation of electricity was a local activity separable from its subsequent interstate transmission. The result in *Pfost* is consistent with decisions of this Court concerning severance or production taxes in other economic areas. *Cf., Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927) (natural gas production); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (iron ore extraction); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922) (anthracite coal extraction); *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919) (manufactured goods).

*Pfost* and its antecedents establish only that a state production tax uniformly applied does not offend the Commerce Clause. In none of these "production tax" cases, however, was there any contention that the levy discriminated against interstate commerce. No prior decision has upheld, under the Commerce Clause, a



production tax which applied only to goods shipped for consumption outside the taxing state; yet that is the essential feature of the tax New Mexico has imposed on electricity produced within its borders.

Perhaps more significantly, the Energy Tax is simply not, in its practical operation, a production or severance tax. By its very terms, the Energy Tax is imposed not upon the generation of power, but upon "the *privilege* of generating electricity in this state *for the purpose of sale*." §72-34-3, NMSA 1953 (1975 P.S.) (emphasis added). Moreover, the economic impact of the Energy Tax does not fall upon all generation of electricity for sale. Under the Act's "credit provisions", no tax liability will accrue if electricity generated in New Mexico is sold for consumption in New Mexico.

At the point of generation, it cannot be ascertained, with any degree of certainty, whether any Energy Tax liability will attach or the amount of tax that will have to be paid. To the contrary, because of the "potential credit" recognized by the Bureau of Revenue's own regulations, neither liability for nor the amount of the Energy Tax can be ascertained until it is determined where the generated electricity will be transmitted and consumed. The practical opeation of the Act's credit provisions delays the incidence of the Energy Tax beyond the point of production to the point of sale and consumption.

The Act is closely analogous to the Texas tax on the occupation of "gathering gas" which this Court invalidated in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). That tax was measured by the volume of gas "taken", and its incidence was

held to be "on the exit of gas from the State"—a point beyond the step where production had ceased and transmission in interstate commerce had begun. The constitutional infirmity was that every state through which the line passed could impose a similar levy and "resurrect the customs barriers which the Commerce Clause was designed to eliminate." 347 U.S. at 170.

The Energy Tax carries the vice perceived in *Michigan-Wisconsin* at least one impermissible step further. In *Michigan-Wisconsin*, the tax in question purported to apply equally to gas which moved both in intrastate and interstate commerce. The Energy Tax does not make that pretense. Here, it is *only* interstate transmission and consumption of electricity that incurs any monetary liability by reason of the Energy Tax. Moreover, while the Texas tax was invalidated because it would "permit a multiple burden" upon interstate commerce, 347 U.S. at 170, here multiple state taxation of the electricity in question is not potential but real.

4. In a variety of analogous contexts, this Court has suggested that both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment independently impose a geographic limitation upon the permissible exercise of the taxing power of a state. Thus, in applying an *ad valorem* property tax to the rolling stock of an interstate railroad, a state must employ a formula that fairly estimates the amount of such property with a taxable *situs* within the state, because:



> In tapping these common sources of revenue a state cannot, we have held, use a fiscal formula, whatever may be its appearance of certitude, to project the taxing power of the state plainly beyond its borders. *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 365 (1940).

The Due Process Clause of the Fourteenth Amendment has been found to impose a similar restriction. *Norfolk & Western Railway v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968). Nor has the rule been confined in its application to state property taxes. *Evco v. Jones*, 409 U.S. 91 (1972) found the application of a New Mexico sales tax to a transaction concluded in another state "an impermissible burden on commerce." 409 U.S. at 93. *Cf., American Oil Co. v. Neill*, 380 U.S. 451 (1965); *Conn. Gen'l Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938).

The economic burden of the Energy Tax falls solely and exclusively upon electricity generated in New Mexico but consumed elsewhere, while sparing locally consumed electricity from any additional tax burden. This disparate impact is neither inadvertent nor fortuitous. The legislative history makes clear that the Energy Tax was conceived, designed and principally defended as a measure that would collect revenues solely from the residents of other states, and was carefully tailored to avoid placing any tax burden whatsoever on the residents of New Mexico.

The Act originated as S.B. 258, introduced and cosponsored by Senator Aubrey Dunn, which imposed a tax on generation of electricity at the rate of one-half mill ($.0005) per kilowatt hour. The Bureau of Reve-

nue Bill Review Report on the measure described the impact of the proposed tax and indicated that, while the tax would increase electricity bills for consumers in other states, it would produce no such increase in charges within New Mexico.

The first hearings were held by the Corporations Committee of the New Mexico Senate, at which time Senator Dunn introduced a Senate Corporations Committee Substitute for Senate Bill 258, which added, *inter alia,* what is now Section 9(C) of the Act. At this hearing, the Commissioner of the Bureau of Revenue assured the Committee that: "[T]he taxpayer in California or the consumer in California would bear the brunt of the tax."

The bill was next considered by the Senate Finance Committee on March 5, where Senator Dunn again stated that "... there will be very little possibility of any of this being passed on to the New Mexico consumer." It was discovered at that hearing, however, that, in the case of at least one New Mexico utility, application of the credit provisions would leave some net Energy Tax liability, which might be passed on to New Mexico residents.

This problem was cured by a Senate Finance Committee Substitute bill, which reduced the tax rate to four-tenths of a mill ($.0004) per kilowatt hour. Materials in the record establish that the rate of tax was reduced to accommodate the one situation where the credit provisions would not wholly abate Energy Tax



liability for a local utility. This Senate Finance Committee Substitute was then debated in the Senate, where Senator Dunn again explained:

> [A]nd the idea behind it, Mr. President, is that we levy this generating tax and we allow the generating companies to take credit for the gross receipts tax which they collect on this power as they sell it, against this particular amount of generation tax. When this is done, Mr. President, it forms a washout which allows that most of the tax could be passed on in almost 99.9 per cent of the time to the residents of Arizona and California.

The legislative history in the New Mexico House of Representatives, which considered the Energy Tax after its passage by the Senate, is of identical import. Appearing before the House Taxation and Revenue Committee, Senator Dunn stressed that under the Act: "there would be hardly any taxation on the individual consumer in the State of New Mexico", and that "this particular tax was for the consumer, Mr. Chairman, for the consumer in Arizona and for the consumer in California."

During the debate in the House of Representatives, the measure was sponsored by Representative Lopez, who had opposed prior attempts to impose generation taxes. Representative Lopez explained his change of heart to his colleagues in the following fashion:

> But my opposition was based on the fact that there was no way to impose the tax without placing a burden on the New Mexico taxpayer or utility user. However, this year a device has been worked out whereby there is a credit in it and the tax will be paid by out-of-state residents with no additional burden on our New Mexico residents.

So, for that reason I stand before you today supporting this bill and carrying it.

This brief description of its legislative history demonstrates that the Energy Tax was conceived and designed for the explicit purpose of deriving tax revenues from residents of other states. In every instance where the possibility was discovered that some portion of the tax burden might fall on New Mexico residents, the bill was rapidly amended to avert it. Initially, Section 9(C) was added to accommodate the local wholesaler who could not take full advantage of the Section 9(B) credit. When it was nevertheless discovered that there was one local utility that might suffer some net Energy Tax liability, the rate of tax was reduced to avoid that result. New Mexico has never seriously disputed that the Act does serve its intended purpose—it imposes a greater tax burden *only* upon electricity transmitted to and consumed in other markets.

In *Austin v. New Hampshire*, 420 U.S. 656 (1975), this Court struck down a New Hampshire "commuter income tax" because: "In effect, then, the State taxes only the income of nonresidents working in New Hampshire," 420 U.S. at 659. While *Austin* was based upon the Privileges and Immunities Clause of Article IV, Section 2, cl. 1, of the Constitution, that clause was viewed as one designed to preserve "the structural balance essential to the concept of federalism." 420 U.S. at 662. The Commerce and Due Process Clauses serve precisely the same concern. The Energy Tax is at least



as serious a manifestation of the states' "centrifugal tendency," 420 U.S. at 660, as was the New Hampshire "commuter tax," and equally deserving of repudiation.

The considerations underlying enactment of the Energy tax are perhaps understandable, but nonetheless constitutionally impermissible. It is not at all surprising that a taxing body should seek to shift the burden of its revenue collections to non-constituents. Similarly, the desire of a state to capitalize upon, or preserve, natural resources located within its borders by natural accident is not a novel phenomenon. *Baldwin v. Seelig*, 294 U.S. 511 (1935); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). It has always been this Court's special function to confine these parochial tendencies to the bounds required by our Federal system. Those bounds are clearly exceeded by the Energy Tax.

5. While the limitations imposed by the Commerce Clause upon the states' taxing power are qualified in nature, that is not the case under the Import-Export Clause (Article I, Section 10). "By its own terms, the prohibition on taxation contained in the Import-Export Clause is absolute . . . ." *Kosydar v. Nat'l Cash Register Co.*, 417 U.S. 62, 65 (1974). *Cf., also, Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946). This Court has recently held that the Import-Export Clause is not offended by a nondiscriminatory *ad valorem* state property tax on imported inventories, *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), nor by a state business and occupation tax as applied to stevedoring. *Dep't of Revenue v. Assoc. of Wash. Stevedoring Companies*, ___ U.S. ___, 46 USLW 4363 (April 26, 1978). In both these decisions,

this Court declined to address the propriety of a state tax on goods in transit to a foreign country.

That is precisely the issue presented here. Some of the appellant utilities generate electricity in New Mexico for sale and consumption in the Republic of Mexico. As noted earlier, the statutory incidence of the Energy Tax is on the generation of electricity *for sale*, and its actual economic incidence is governed by its point of eventual consumption. In either event, New Mexico has delayed the imposition of its Energy Tax to a point beyond where production has ceased and the process of interstate transmission has begun. With respect to the electricity transmitted to and consumed in Mexico, the Energy Tax is in a very real sense imposed upon a good in transit to that foreign nation. This Court has specifically reserved judgment on the propriety of such a tax under the Import-Export Clause, and should address the question here.

## CONCLUSION

The remarks of Senator Fannin, speaking on the Senate floor in opposition to the "Domenici Amendment" described earlier, eloquently describe the fundamental importance of the questions presented by this appeal:

> Mr. President, we are not talking about only Arizona and New Mexico. We are talking about what could happen all over the United States. We are talking about a potential taxing war on the sale of power which could be devastating. 122 Cong. Rec. S12713 (daily ed. July 28, 1976).



Senator Fannin's observations have proved prophetic. West Virginia has recently amended its tax code to impose a levy on exported electricity, W. Va. Code §11-13-2m, and Pennsylvania has enacted a gross receipts tax on "sales of electric energy produced in Pennsylvania and made outside of Pennsylvania."[7] Power has become a precious commodity, and the temptation to collect revenue from its production without burdening the residents of the taxing jurisdiction is compelling. This Court should reiterate and clarify the governing constitutional principles at the incipiency of this movement.

The Congressional response to this potential national problem was prompt and explicit — condemnation of New Mexico's Energy Tax and prohibition of the enactment of similar state taxing measures in the future. That Congressional response has been effectively nullified by the decision to be reviewed. In the process, the New Mexico Supreme Court has sustained the principle that a state may validly impose an excise upon the exit from its borders, for sale and consumption in other states, of products locally produced. That principle is at once unprecedented and contrary to the consistent teachings of this Court concerning the purposes served by the Commerce Clause. The federal questions presented are

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[7] The full text of the pertinent portions of the statutes enacted by West Virginia and Pennsylvania are set forth in Appendices F and G, respectively.

substantial and important, and this Court should grant them plenary consideration.

Respectfully submitted,

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*Attorneys for Appellants*

By _____
Daniel J. McAuliffe

IN THE

# Supreme Court of the United States

OCTOBER TERM, __

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No. __

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ARIZONA PUBLIC SERVICE COMPANY, et al.,

*Appellants,*

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, et al.,

*Appellees.*

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## CERTIFICATE OF SERVICE BY MAIL

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Daniel J. McAuliffe, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for Appellants herein, Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company, and Tucson Gas & Electric Company.

2. That the Jurisdictional Statement submitted herewith has been served upon counsel, in accordance with the provisions of Rule 33 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, prop-

erly addressed, this 20th day of June, 1978, to:

Toney Anaya
Attorney General of New Mexico
P. O. Box 1508
Santa Fe, New Mexico 87503

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Santa Fe, New Mexico 87501

3. That the foregoing represents service on all parties required to be served under the provisions of rule 33, Rules of the United States Supreme Court.

/s/ DANIEL J. MCAULIFFE
Daniel J. McAuliffe



## APPENDIX A

**State of New Mexico** **County of Santa Fe**

**IN THE DISTRICT COURT**

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,
*Plaintiffs,*

vs.

FRED O'CHESKEY, Commissioner of Revenue, Bureau of Revenue, and STATE OF NEW MEXICO,
*Defendants.*

No. 50245

### MEMORANDUM OPINION

This is a suit for a declaratory judgment and injunction whereby plaintiffs seek to have the Court declare and adjudicate as unconstitutional and void the New Mexico Electrical Energy Tax Act, Chapter 263, Laws 1975 (Sections 72-34-1 to 72-34-6, NMSA 1953). The suit further seeks to enjoin the enforcement of that act.

We decide these legal and equitable issues in favor of the defendants.

The operable provisions of the Electrical Energy Tax Act material to the issues in this case are as follows:

"Section 72-34-3. Imposition of tax — Rate — Denomination as electrical energy tax. — A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill. ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the 'electrical energy tax.'

Section 72-34-6. Relief from other taxes. — Unless otherwise specified by statute the imposition of the electrical energy tax shall not act to relieve any person or activity from any other tax levied by the State of New Mexico or its political subdivisions."

At the same session of the New Mexico Legislature, and apparently in conjunction with the passage of the Electrical Energy Tax Act, the Legislature amended the Gross receipts tax law by enacting Chapter 263, Section 9, Laws 1975 (Section 72-16A-16.1, NMSA, 1953), which states:

"Credit — Gross receipts tax. — A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivision thereof, the amount of such tax paid may



be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

In their complaint plaintiffs allege that the Electrical Energy Tax Act is unconstitutional in that:

(1) It violates the commerce clause of Article I, Section 8 of the United States Constitution by discriminating against and imposing burdens upon each plaintiff's interstate commerce in the transmission and sale of electricity;

(2) It denies unto plaintiffs equal protection of the law contrary to Section 1 of the Fourteenth Amendment to the United States Constitution, and of Article II, Section 18 and Article IV, Section 26 of the New Mexico Constitution;

(3) It deprives plaintiffs of property without due process of law in violation of Article II, Section 18 of the New Mexico Constitution;

(4) It violates Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constitution.

After the complaint was filed and during the pendency of this case, the United States Congress passed what was named and referred to as the "Tax Reform Act of 1976." Section 1322, Title II, Section 201(a) of that act contains all the provisions thereof that are here applicable and is quoted:

"No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."

Since the passage of the Tax Reform Act of 1976, plaintiffs have added to their claim that the New Mexico Electrical Energy Tax Act is void and invalid, in that it now violates Federal law.

It is only the gross receipts tax credit provisions found in Section 72-16A-16.1, NMSA, 1953, supra which may be said to set up in this case a justicable controversy, and which give birth to the claims of the plaintiffs. Absent such credit provisions, we would have only a tax on the generation of electricity applicable to all alike as spelled out in Section 72-34-3 NMSA. 1953, supra. While plaintiffs in oral argument asserted that they believe even that situation to be unconstitutional, no authorities supporting such a stance were cited, nor have any come to the attention of the Court. Indeed, plaintiffs tacitly admitted that the United States Supreme Court in 1932 held that



the generation of electricity is a local incident separable from the process of transmission, and that a tax thereon is not per se a tax or a burden on interstate commerce. In the case of Utah Power & L. Co. v Pfost, 286 U.S. 165 (1932), Mr. Justice Sutherland who delivered the opinion of the Court, stated:

"We are satisfied upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. Cornell v. Coyne, 192 U.S. 418, 428-429. 'Commerce succeeds to manufacture, and is not a part of it.' United States v. E. C. Knight Co., 156 U.S. 1,12." See also South Carolina Power Co. v. South Carolina Tax Commission. 52F(2d)515 (1931); State of Alaska v. Arctic Maid, 366 U.S. 199, 81 S.Ct. 929 (1961).

Utah Power & L. Co. v. Pfost, supra, decided by the United States Supreme Court in 1932 has never been reversed and is still the supreme law of the land.

We must, therefore, inquire only into whether the Gross receipts tax credits provided for by Section 72-16A-16.1. NMSA 1953, supra, so change the character of the Electrical Energy Tax Act as to convert it into an unconstitutional and Federally proscribed law. The Electrical Energy Tax of $.0004 per net kilowatt hour variably amounts to from 1.333% to 2% of the dollar value of the electricity generated as was asserted and

unchallenged in oral argument. For purposes of discussion of that tax in context with the Gross receipts tax, we shall call the Electrical Energy Tax a 2% tax.

Plaintiffs contend that they must pay the full 2% tax on electricity which they generate in New Mexico and sell for consumption in other states, while other manufacturers of electricity in New Mexico, who sell that electricity for consumption in New Mexico, escape the electrical energy tax because they get full credit for that tax so paid upon their gross receipts tax liability to the State of New Mexico. No so, say the defendants. Rather, they assert that manufacturers of electricity who sell the electricity for consumption in New Mexico pay the 2% electrical energy tax plus 2% of the 4% gross receipts tax for which no credit is available, or a total of 4% on the value of the electricity, being a combination of the two types of taxes. Conversely, the local manufacturer-local vendors contend that their local manufacturer-interstate vendor bretheren have only to pay the electrical energy tax of 2% to the State of New Mexico and have no gross receipts tax to pay to the State of New Mexico whatsoever, 2% of the value of the electricity *less* paid to the State of New Mexico than that paid by local manufacturer-local vendors. In the case of Public Utility District No. 2 of Grant County v. State, 82 Wash (2d) 232, 510 P(2d) 206 (1973), one test for the resolution of the issue at hand is set out in the following language:

"In deciding the issue of this appeal, a proper analysis must take the whole scheme of taxation into account to determine whether the actual operation of that taxing structure in its relationship to intrastate



and interstate commerce results in an unconstitutional discrimination against the latter." See also South Carolina Power Co. v. South Carolina Tax Commission, et al supra.

Obviously, when applied to the case at bar, Public Utility District No. 2, supra, when it speaks of the "whole scheme of taxation" would mean the scheme of taxation only of New Mexico and not superimposed thereon any taxes that may or may not thereafter be levied by another or other states. If it were otherwise, any other state, capriciously, could invalidate New Mexico tax laws and play havoc with our lawful right to raise revenue by the mere expedient of levying some tax within that state upon any commodity originating in New Mexico. A New York sales tax or gross receipts tax, under such a false rationale, could invalidate a manufacturer's tax on Indian jewelry manufactured in New Mexico and sold in New York.

By the test set forth in Public Utility District No. 2, supra, plaintiffs pay 2% total tax to New Mexico on the electricity that they send into interstate commerce, whereas, their fellow manufacturer's [sic] of electricity pay 4% total tax to New Mexico on the electricity that they send into intrastate commerce. This is the practical, pragmatic tax result, the substantive result which is not changed a fraction of a percent by semantics, specious reasoning or otherwise. The "whole shceme of taxation" imposed by New Mexico upon the generation and sale of electricity imposes a total tax of 2% interstate and a total tax of 4% intrastate. Certainly, such a "whole scheme of taxation" cannot be said to result in an unconstitutional discrimination against interstate commerce. Should New Mexico eliminate all

credits and reduce the retail gross receipts tax on the sale of electricity from 4% to 2%, the same net result would be achieved as to that electricity now available for a gross receipts tax credit. New Mexico, however, would lose gross receipts revenue on electricity retailed in New Mexico, not under present law available for a tax credit. Such a change in the law, however, would not alter the position of plaintiffs as to any taxes they would have to pay.

Both plaintiffs and defendants, aside from constitutional and statutory provisions and case law that may be applicable to the issues, have advanced arguments which appear to appeal to fundamental fairness and directed to the morality of the situation. Plaintiffs argue that it is unfair to provide for tax credits which others may claim, but which they cannot avail themselves of. Defendants assert that plaintiffs save millions each year by burning coal on site in New Mexico to generate electricity compared to the cost of generating electricity at the next most feasible site outside New Mexico. Further, the ecological damage to New Mexico from plaintiffs [sic] activity is spared of the more populous energy consuming states to which the New Mexico electricity is transmitted. Defendants state that this damage runs into millions each year over and above any receipts from the electrical energy tax. In effect defendants contend that New Mexico should not be an energy satellite of the more populous western states, to her ecological disadvantage, stripped of state revenue on the generation of electricity transmitted to the unscarred states. It would certainly seem reasonable that the founding fathers in placing the commerce clause in the Constitution never envisioned



or intended that it be availed of by industry in one state or the requirements of its inhabitants to make subservient the ecology and quality of life of another state without some countervailing right for some revenue from *all* energy producers flowing to the host state. The fundamental fairness arguments of the defendants would appear to have the greater degree of credibility. Nevertheless, such arguments by either party cannot be persuasive or determinative of any of the legal issues involved in this controversy. Such issues must be resolved in keeping with and solely upon applicable constitutional and statutory provisions and governing case law.

The Tax Reform Act passed by the United States Congress in 1976 was dealt with extensively by defendants in oral argument. Defendants asserted that the original version as introduced in Congress was watered down and revamped so as not to disturb the West Virginia Electricial Energy Tax Law and thus incur the wrath of the Senator from West Virginia, whereby defeat of the bill would have been a certainty; that it was specially retailored and directed at New Mexico. This averment was not refuted or answered by plaintiffs. Be that as it may, whatever the legislative history or motivation, the statutory enactment proceeds with a presumption as to its constitutionality, a principle of statutory construction that cannot be ignored or evaded.

The Tax Reform Act, when its language here is applied, is innocuous, and it does not reach the New Mexico Electrical Energy tax. We need not inquire into its constitutionality unless we first determine that its terms make themselves applicable to the issue.

They are not here applicable. The first sentence of Section 201(a) of that act, supra, prohibits any state from imposing a tax with respect to the generation or transmission of electricity which discriminates against out-of-state manufacturers, producers, wholesalers, retailers or consumers of that electricity. No one quarrels with that provision. The next sentence defines discrimination as that which results "either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. No one quarrels with that proposition. As has been demonstrated, the New Mexico total tax on electricity results in a *lesser* tax burden on electricity generated and transmitted in interstate commerce than the total tax on electricity generated and transmitted in intrastate commerce. The *lesser* tax burden does not discriminate against interstate commerce, it is only the greater tax burden which would discriminate. Plaintiffs' position upon this aspect can find support only through a patent convolution of the commerce clause of the United States Constitution.

The claim that the Electrical Energy tax is unconstitutional because it denies plaintiffs equal protection of the law and takes their property without due process of law fundamentally rests upon the same rock as their claim that it violates the commerce clause of the United States Constitution by discrimination against plaintiffs [sic] interstate commerce activity. They have no better or greater validity than their erroneous counterpart.



This case was submitted upon cross motions for summary judgment. All parties are in agreement and have stipulated that there is no substantial issue of fact in the case to be decided by the Court. Consequently, the case is decided upon the principles of law set forth in this memorandum opinion. It follows therefore, that the defendants must prevail and that the complaint of the plaintiffs must be dismissed. Judgment consistent herewith should be entered in favor of defendants.

/s/ EDWIN L. FELTER
DISTRICT JUDGE

## APPENDIX B

**IN THE**
**Supreme Court of the State of New Mexico**

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ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,
*Plaintiffs-Appellants,*

*vs.*

FRED O'CHESKY, Commissioner of Revenue, Bureau of Revenue and STATE OF NEW MEXICO,
*Defendants-Appellees.*

No. 11,369

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Appeal from the District Court of Santa Fe County
EDWIN L. FELTER, District Judge

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& Hannahs
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Santa Fe, New Mexico

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Sloan, Akin & Robb
William C. Schaab
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Mexico

White, Koch, Kelly &
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## OPINION

PAYNE, Justice

Appellants, five major public utility companies who generate electricity in New Mexico, sought a judgment declaring the provisions of the Electrical Energy Tax Act, Ch. 263, 1975 N.M. Laws 1371[1] to be unconstitutional and void. The district court denied their motion for summary judgment and granted summary judgment on a cross-motion filed by the appellee, Commissioner of the Bureau of Revenue. We sustain the trial court.

There was testimony that power plants owned and operated by the utility companies within the State of New Mexico cause an estimated $12,000,000 of environmental damage each year. There was evidence that the socio-economic problems caused by the plants may cost as much as $27,000,000 to remedy. Further testimony indicated that if the utilities were to generate the same amount of electricity at their plants outside of New Mexico it could cost them an additional $124,000,000 annually. New Mexico enacted the Electrical Energy Tax to deal with these conditions. The Act imposes a tax upon the "privilege of generating electricity in this state for the purpose of sale." The provisions of the Act pertinent to this suit are §§ 3[2] and 9[3] Section 3 provides as follows:

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[1] The Act amended §§ 45-4-28 and 72-13-24, N.M.S.A. 1953 and added §§ 72-34-1 through 72-34-6 and 72-16A-16.1.

[2] Section 72-34-3, N.M.S.A. 1953 (Supp. 1975).

[3] Section 72-16A-16.1, N.M.S.A. 1953 (Supp. 1975).

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

Section 9 provides:

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, *the amount of such tax paid may be credited against the gross receipts tax due this state.* (Emphasis added.)

Section 3 imposes a 2% tax[1] on all electricity generated in the state. Section 9 provides a tax credit against the 4% gross receipts tax imposed on all retail sales in the state. The ultimate effect is that in-state sales are, as in the past, subject to a total tax burden of 4% while out-of-state sales are subjected to a 2% tax burden which they previously did not have.

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[1] For the sake of clarity in this opinion we will refer to the tax as 2% although it varies slightly and is usually less.



During the pendency of this litigation, the United States Congress enacted the Tax Reform Act of 1976. Section 2121(a) of that Act, 15 U.S.C. § 391 (1976), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity *which discriminates* against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory *it if results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.* (Emphasis added.)

The appellants argue that New Mexico's Electrical Energy Tax is prohibited by § 2121(a) of the federal act because it discriminates against out-of-state producers. If so, it must give way to the federal act because of the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2.

The operative test of a discriminatory tax under § 2121(a) is:

> [I]f it results, either directly or indirectly, in a *greater tax burden* on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. (Emphasis added.)

The utilities contend that the credit provisions of the Electricial Energy Act result in a "greater tax burden" on electricity destined for use out-of-state than

on electricity used instate. They misread the section's language. The word "greater" means "larger", not "additional." As used, greater is a word of comparison.

The Electrical Energy Tax does not "directly" place a greater tax burden on electricity destined for out-of-state transmission. All utilities pay the same generating tax at the same rate. Ch. 263, § 3, 1975 N.M. Laws 1371.

To determine whether the Electrical Energy Tax "indirectly" results in a greater burden on electricity destined for out-of-state use as compared to electricity used within the state, the *entire tax structure* of a state as applied to the *particular commodity* which is taxed must be examined. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Gregg Dyeing Co. v. Query*, 286 U.S. 472 (1932).

The test of discrimination is not whether a tax imposes an *additional* burden on out-of-state electricity compared to the situation prior to passage of the tax. The test is whether the generation tax on electricity destined for out-of-state use is larger than the total tax on each unit of electricity subsequently consumed in New Mexico. The gross receipts tax, although reduced by the amount of generation tax, continues to impose a burden on in-state sales of electricity from which out-of-state sales of electricity are exempted. Thus, while the out-of-state electricity must bear an *additional* tax that it was not previously required to bear, payment of this tax does not result in a "greater tax burden" on that electricity.



New Mexico chose to decrease the rate of its sales tax for electricity by allowing the generation tax to be credited against its sales tax. This approach is not condemned by § 212(a). A state has the power to shift the burden of its tax as it feels best as long as it does so in a nondiscriminatory manner. *See Public Utility Dist. No. 2 of Grant County v. State*, 82 Wash. 2d 232, 510 P.2d 206 (1973), *appeal dismissed for want of a substantial federal question*, 414 U.S. 1106 (1974).

Appellants further claim that the Electrical Energy Tax violates the Commerce Clause of the United States Constitution. U.S. Const. art, I, § 8, cl. 3. They claim that the energy tax places an undue burden on interstate commerce. Interstate commerce and its instrumentalities are not immune from state taxation. Interstate commerce must pay its own way. *Western Live Stock v. Bureau*, 303 U.S. 250, 254 (1938).

The test in determining whether the Electrical Energy Tax places an undue burden on interstate commerce, is whether the Act, in its practical application, discriminates against interstate commerce. *Best & Co. v. Maxwell*, 311 U.S. 454, 455, 456 (1940). The courts in passing on this question have employed two tests:

> (1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage when competing locally; *the discrimination test*. (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; *the multiple burden test*.

*Public Utility, supra,* at 209.

Appellants argue that the enrgy tax is contrary to both the discrimination test and the multiple burden test.

(1) *Discrimination Test*

Appellants contend that while the energy tax on its face may not violate the Commerce Clause, the operation of the credit provisions contained in § 9 of the Act work to discriminate against the out-of-state producer. We do not agree with this analysis.

The appellants have failed to show that the energy tax as applied places out-of-state producers at a disadvantage when competing against local producers. The out-of-state producers who retail electricity inside the state get the same tax credit as the in-state producers. If electricity consumed in New Mexico is subject to an electrical energy tax imposed by another state it can also take advantage of the credit provisions of § 9. Further, the electricity that is retailed outside the state is not in competition with the electricity consumed within the state. Without competition there can be no discrimination. *Public Utility, supra.*

In the present case the Legislature has determined that instead of a strict 4% gross receipts tax on the retail sale of electricity they would impose a 2% tax on the generation and a 2% tax on the retail sale. In this instance we find no discrimination. All producers of electricity are subject to the energy tax. All producers who retail their electricity in New Mexico can take



advantage of the credits provided in § 9. The energy tax does not place the out-of-state producer at a disadvantage when competing against the in-state producer.

(2) *Multiple Burden Test*

Appellants also argue that the energy tax is discriminatory because its sole and exclusive economic impact is upon an interstate transaction — the transmission of electricity for consumption in other states. They cite as authority, *Mich.-Wis. Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). In that case the United States Supreme Court invalidated a Texas tax on the occupation of "gathering gas," measured by the volume of gas "taken," because the incidence of the tax had been delayed beyond the step where production has ceased and transmission in interstate commerce had begun. The Court held that the incidence of the tax was "on the exit of gas from the State," and found that the gathering of the gas into transmission lines was an integral part of interstate commerce. *Id.* at 167. Had Texas been allowed to impose such a tax, the door would have been opened for other states on the line to tax the volume of gas in the pipeline as it crossed their boundaries. The net effect would have been "to resurrect the customs barriers which the Commerce Clause was designed to eliminate." *Id.* at 170.

Appellants contend that the Electrical Energy Tax Act carries the vice condemned in *Michigan-Wisconsin* further, stating that it is only interstate transmission and consumption of electricity that incurs any monetary liability by reason of the energy tax. We cannot agree with their analysis.

There is a distinct difference between the generation of electricity and the transmission of electricity as it relates to interstate commerce. The United States Supreme Court has held that:

> [T]he process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture.

*Utah Power & L. Co. v. Pfost*, 286 U.S. 165, 181 (1932).

The energy tax is a tax on the generation of electricity and electricity can only be generated once. Since the electricity is generated in the State of New Mexico, only New Mexico can impose a tax on the generation. Only if the tax were imposed upon some later, nonlocal process would the *Michigan-Wisconsin* case be applicable.



For the reasons stated, we affirm the trial court and hold the Electrical Energy Tax to be constitutional and valid.

IT IS SO ORDERED.

/s/ H. VERN PAYNE
H. VERN PAYNE, Justice

WE CONCUR:

/s/ DAN SOSA, JR.
DAN SOSA, JR., Justice

/s/ MACK EASLEY
MACK EASLEY, Justice

## APPENDIX C

## IN THE

## Supreme Court of the State of New Mexico

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,
*Plaintiffs-Appellants,*

vs.

FRED O'CHESKEY, Commissioner of Revenue, Bureau of Revenue and STATE OF NEW MEXICO,
*Defendants-Appellees.*

No. 11369

### NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Arizona Public Service Company, El Paso Electric Company, Salt River Project Agricultural Improvement and Power District, Southern California Edison Company and Tucson Gas & Electric Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico, affirming the judg-

ment of the District Court of Santa Fe County, entered in this action on March 23, 1978. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 11th day of April, 1978.

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Daniel J. McAuliffe, Esq.

**IN THE**

**Supreme Court of the State of New Mexico**

| | |
|---|---|
| ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY, *Plaintiffs-Appellants,* | No. 11369 |
| vs. | |
| FRED O'CHESKEY, Commissioner of Revenue, Bureau of Revenue and STATE OF NEW MEXICO, *Defendants-Appellees.* | |

AFFIDAVIT

STATE OF NEW MEXICO } ss.
COUNTY OF SANTA FE }

I, Richard N. Carpenter, being first duly sworn and upon oath, state that I caused three (3) copies of the foregoing Notice of Appeal, dated April 11, 1978, to be served on counsel of record for each adverse party by depositing the same on October 12, 1978 in a United States post office or mail box, with first class postage



prepaid, addressed to counsel of record at his post office address, to wit,

Toney Anaya
Attorney General of New Mexico
Post Office Box 1508
Santa Fe, New Mexico 87503

Jan Unna
Daniel H. Friedman
Special Assistants Attorney General
Post Office Box 630
Santa Fe, New Mexico 87501,

all in compliance with Rules 10 and 33 of the Rules of the Supreme Court of the United States.

/s/ RICHARD N. CARPENTER
Richard N. Carpenter

SUBSCRIBED AND SWORN to before me this 12th day of April, 1978.

Notary Public

My commission expires:

February 21, 1981.

## APPENDIX D

## CHAPTER 263

## AN ACT

RELATING TO TAXATION; IMPOSING A TAX ON THE GENERATION OF ELECTRICITY; AMENDING SECTIONS 45-4-28 and 72-13-24 NMSA 1953 (BEING LAWS 1939, CHAPTER 47, SECTION 28 AND LAWS 1965, CHAPTER 248, SECTION 12, AS AMENDED); ENACTING A NEW SECTION 72-16A-16.1 NMSA 1953.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. *Short Title.* Sections 1 through 6 of this act may be cited as the "Electrical Energy Tax Act." [§72-34-1, NMSA 1953 (1975 P.S.)]

Section 2. *Definitions.* As used in the Electrical Energy Tax Act:

A. "bureau" means the New Mexico bureau of revenue;

B. "generation" includes manufacture and production;

C. "electricity" includes electrical energy and electrical power;

D. "person" means any individual, estate, trust, receiver, cooperative association, electric cooperative, club, corporation, company, firm, partnership, joint venture, syndicate, association, irrigation district, electrical irrigation district and any utility owned or operated by a county or municipality, and also means

to the extent permitted by law, any federal, state or other governmental unit or subdivision or an agency, department or instrumentality; and

E. "sale" means selling or transferring to any person for consumption, use or resale and includes barter and exchange. [§72-34-2, NMSA 1953 (1975 P.S.)]

Section 3. *Imposition of Tax-Rate-Denomination As Electrical Energy Tax.*

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the "electrical energy tax." [§72-34-3, NMSA 1953 (1975 P.S.)]

Section 4. *Measurement and Recording of Kilowatt Hours of Electricity.* Persons subject to the imposition of the electrical energy tax shall maintain accurate measuring devices and records to measure and record the daily and cumulative monthly and yearly totals of kilowatt hours of electricity generated or distributed in this state. [§72-34-4, NMSA 1953 (1975 P.S.)]

Section 5. *Reports-Remittances.* Every person subject to the imposition of the electrical energy tax shall file a return on forms provided by and with the information required by the bureau and shall pay the tax



due on or before the twenty-fifth day of the second month following the month in which the taxable event occurs. [§72-34-5, NMSA 1953 (1975 P.S.)]

Section 6. *Relief From Other Taxes.* Unless otherwise specified by statute the imposition of the electrical energy tax shall not act to relieve any person or activity from any other tax levied by the State of New Mexico or its political subdivisions. [§72-34-6, NMSA 1953 (1975 P.S.)]

Section 7. Section 45-4-28 NMSA 1953 (being Laws 1939, Chapter 47, Section 28, as amended) is amended to read:

"45-4-28. *Taxation.* Cooperative and foreign corporations, transacting business in this state pursuant to the provisions of Section 45-4-1 through 45-4-32 NMSA 1953 shall pay annually, on or before July 1, to the state corporation commission, a tax of ten dollars ($10.00) for each one hundred persons or fraction thereof to whom electricity is supplied within this state which tax shall be in lieu of all other taxes except those provided in the Gross Receipts and Compensating Tax Act, and the Electrical Energy Tax Act; provided, however, that in the event a contract has been entered into by a rural electric cooperative and a power consumer prior to February 1, 1961, and such contract does not contain an escalator clause providing for an increase for added tax liability on the cooperative, then the sale to such power consumer shall be exempt until the expiration, extension or renewal of the contract."

Section 8. Section 72-12-24 NMSA 1953 (being Laws 1965, Chapter 248, Section 12, as amended) is amended to read:

"72-13-24. *Receipts-Disbursements-Distribution.*

A. All money received by the bureau shall be deposited with the state treasurer before the close of the next succeeding business day after receipt of the money.

B. Money received or disbursed by the bureau shall be accounted for by the commissioner as required by law or regulation of the director of the department of finance and administration.

C. Disbursements for tax credits, refunds and the payment of interest shall be made by the department of finance and administration upon request and certification of their appropriateness by the commissioner or his delegate. The state treasurer shall create a suspense fund for the purpose of making the disbursements authorized by the Tax Administration Act. All revenues collected pursuant to the provisions of Sections 72-15-1 through 72-15-37 NMSA 1953, the Income Tax Act, the Withholding Tax Act, the Gross Receipts and Compensating Tax Act, the Resources Excise Tax Act, the Liquor Excise Tax Act and the Electrical Energy Tax Act shall be credited to this suspense fund and are appropriated for the purpose of making disbursements for tax credits, refunds and the payment of interest.

D. On the last day of each month, any money remaining in the suspense fund after the necessary disbursements have been made shall be identified by tax source and transferred from the suspense fund,



one-half of the receipts attributable to the electrical energy tax shall be transferred to the "electrical energy fund," hereby created, and the remainder to the state general fund, except that before the remaining money is transferred to the general fund, an amount equal to one percent of the taxable gross receipts reported for the month of deposit:

(1) for each municipality shall be distributed to each municipality; and

(2) by taxpayers who have business locations on an Indian reservation or pueblo grant in an area which is contiguous to a municipality and in which the municipality performs services pursuant to a contract between the municipality and the Indian tribe or Indian pueblo shall be distributed to the municipality if:

(a) the contract describes the area in which the municipality is required to perform services and requires the municipality to perform services that are substantially the same as the services the municipality performs for itself; and

(b) the governing body of the municipality has submitted a copy of the contract to the commissioner of revenue.

E. Disbursements to cover expenditures of the bureau shall be made only upon approval of the commissioner or his delegate.

F. Miscellaneous receipts from charges made by the bureau to defray expenses pursuant to the provisions

of Section 72-13-23 and 72-13-39 NMSA 1953 and similar charges are appropriated to the bureau for its use."

Section 9. A new Section 72-16A-16.1 NMSA 1953 is enacted to read:

"72-16A-16.1. *Credit-Gross Receipts Tax.*

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

Section 10. *Legislative Intent.* It is the intent of the legislature that this entire 1975 act be considered not severable, and should any part hereof be declared unconstitutional, the entire act should be declared void. [not codified]

Section 11. *Effective Date.* The effective date of the provisions of this act is July 1, 1975. [not codified]



## APPENDIX E

G.R. REGULATION 16.1:1 - CREDIT OF ELECTRICAL ENERGY TAX ON ELECTRICITY GENERATED IN NEW MEXICO AGAINST GROSS RECEIPTS TAX —

A. For purposes of the credit against gross receipts tax, "consumption or consumed" also includes that quantity of electricity lost through the transmission and distribution process which occurs in New Mexico.

B. Section 72-16A-16.1(C) requires that a potential credit be assigned to persons purchasing electricity for resale:

1) to buyers who will potentially consume or use the electricity in New Mexico, or

2) to buyers who will potentially resell the electricity for consumption in New Mexico;

on which an electrical energy tax or similar tax has been levied by New Mexico, by another state or by political subdivision thereof and paid by the seller.

Each seller of electricity as described in this paragraph must assign, to each buyer described in subparagraphs (1) and (2) of this paragraph, a pro rata share of the total available potential credit provided in Section 72-16A-16.1 (A) or (B).

C. It shall be presumed that the potential credit against gross receipts tax as provided by Section 72-16A-16.1(C) shall have been assigned when the buyer

is in receipt of an invoice from the seller separately stating the amount of the applicable Electrical Energy Tax or similar tax as provided in Section 72-16A-16.1.

In the absence of bad faith, a wholesale purchaser in New Mexico of electricity may rely upon such an invoice in claiming a credit under Section 72-16A-16.1.

D.

1) That portion of the potential credit assigned to a buyer further reselling the electricity for consumption in New Mexico may be credited by the assignee against the gross receipts tax due New Mexico on receipts from the sale of electricity for any month subsequent to July 1, 1975.

2) That portion of the potential credit assigned to a buyer further reselling the electricity at wholesale to buyers who will resell the electricity for consumption in New Mexico must be reassigned to the subsequent buyer as provided in paragraph B of this regulation.

3) That amount of electrical energy tax credit which is not assigned to appropriate buyers and which is otherwise creditable under Section 72-16A-16.1, may be credited against gross receipts tax due New Mexico on receipts from the sale of electricity for any reporting month subsequent to July 1, 1975.

E. To be allowable the credit must be claimed within the period provided in Section 72-13-40(B). Reflecting a credit on the taxpayer's CRS-1 return or attachme t thereto will be treated as a claim for credit.



## APPENDIX F

Sections 11-13-2d and 11-13-2m of the Code of West Virginia, as enacted by Senate Bill No. 163 (effective April 1, 1978):

§11-13-2d. Public service or utility business.

Upon any person engaging or continuing within this state in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there is likewise hereby levied and shall be collected taxes on account of the business engaged in equal to gross income of the business multiplied by the respective rates as follows: Street and interurban and electric railways, one and four-tenths percent; water companies, four and four-tenths percent; except as to income received by municipally owned water plants; electric light and power companies, four percent on sales and demand charges for domestic purposes and commercial lighting and four percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants producing or purchasing electricity and distributing same: *Provided*, That electric light and power companies which engage in the supplying of public service but which do not generate or produce electric power shall be taxed on the gross income derived therefrom at the rate of three percent on sales and demand charges for domestic purposes and commercial lighting and three percent on sales and demand charges for all other purposes, except as to income received by municipally owned plants: *Provid-*

*ed, however,* That the sale of electric power under this section shall be taxed at the rate of two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year; natural gas companies, four and twenty-nine hundredths percent on the gross income; toll bridge companies, four and twenty-nine hundredths percent; and upon all other public service or utility business, two and eighty-six hundredths percent. The measure of this tax shall not include gross income derived from commerce between this state and other states of the United States or between this state and foreign countries. The measure of the tax under this section shall include only gross income received from the supplying of public services. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon the appropriate section or sections of this article.

* * * *

§11-13-2m. Business of generating or producing electric power; exception; rates.

(1) Upon every person engaging or continuing within this state in the business of generating or producing electric power for sale, profit or commercial use, either directly or though the activity of others, in whole or in part, when the sale thereof is not subject to tax under section two-d of this article, the amount of the tax to



be equal to the value of the electric power, as shown by the gross proceeds derived from the sale thereof by the generator or producer of the same multiplied by a rate of four percent, except that the rate shall be two and forty-six hundredths percent on that portion of the gross proceeds derived from the sale of electric power to a plant location of a customer engaged in a manufacturing activity, if the contract demand at such plant location exceeds two hundred thousand kilowatts per hour per year, or if the usage at such plant location exceeds two hundred thousand kilowatts per hour in a year.

(2) The measure of this tax shall be the value of all electric power generated or produced in this state for sale, profit or commercial use, regardless of the place of sale or the fact that transmission may be to points outside this state: *Provided,* That the gross income received by municipally owned plants generating or producing electricity shall not be subject to tax under this article.

# APPENDIX G

Section 1101(b) of the Pennsylvania Tax Reform Code of 1971, as enacted and amended by Pennsylvania Act of Assembly No. 1977-100 (effective December 21, 1977):

(b) Electric Light, Waterpower and Hydro-electric Utilities.—Every electric light company, waterpower company and hydro-electric company now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other state or by the United States or any foreign government and doing business in this Commonwealth, and every limited partnership, association, joint-stock association, copartnership, person or persons, engaged in electric light and power business, waterpower business and hydro-electric business in this Commonwealth, shall pay to the State Treasurer, through the Department of Revenue, a tax of forty-five mills upon each dollar of the gross receipts of the corporation, company or association, limited partnership, joint-stock association, copartnership, person or persons, received from:

(1) the sales of electric energy within this State, except gross receipts derived from the sales for resale of electric energy to persons, partnerships, associations, corporations or political subdivisions subject to the tax imposed by this subsection upon gross receipts derived from such resale; and

(2) the sales of electric energy produced in Pennsylvania and made outside of Pennsylvania according to the following apportionment formula: except for gross receipts derived from sales under clause (1), the gross receipts from all sales of electricity of the producer shall be apportioned to the Commonwealth of Pennsylvania by the ratio of the producer's operating and maintenance expenses in Pennsylvania and depreciation attributable to property in Pennsylvania to the producer's total operating and maintenance expenses and depreciation.